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NO. 83-1740

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

SENN TRUCKING COMPANY,

Petitioner,

vs.

ROBERT C. WASSON, CHAIRMAN
CHARLES N. PLOWDEN AND
JOHN H. LAFITTE, JR.,
CONSTITUTING THE MEMBERS
OF THE SOUTH CAROLINA TAX
COMMISSION,

Respondents.

BRIEF IN OPPOSION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the imposition by South Carolina of a use tax resulting from the purchase of trailers violate Article 1, Section 8 of the United States Constitution (Commerce Clause) where such trailers were transported empty to South Carolina, were subjected to numerous modifications and repairs in South Carolina, and were held in storage in South Carolina for two to three weeks before picking up their first load of freight within the State?

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OPINION AND ORDER IN PRIOR PROCEEDINGS

The opinion and order in prior court proceedings have been adequately set forth in the Petition for Writ of Certiorari and nothing further is added here.

JURISDICTION

This Honorable Court is being asked to accept jurisdiction of this matter under 28 U.S.C. 1257(3). Although this matter may be technically within 28 U.S.C. 1257(3), the granting of a review on Writ of Certiorari is a matter of judicial discretion and should be granted only where there are special and important reasons. There are not such reasons in the instant case since the applicability of a use tax to equipment stored or used in a state prior to such equipment's entering interstate commerce has been confirmed by this Court in prior opinions.

Southern Pacific Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586 (1939) and Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1936). Thus the South Carolina Supreme Court has decided the issue in compliance with the United States Supreme Court's decisions and jurisdiction should be denied.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

Constitutional Provision

The Commerce Clause, Article 1, Section 8, Clause 3:

> "The congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes; * * *."

State Statutes

1. Section 12-35-810 provides:

> "An excise tax is imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use or other consumption in this State, at the rate of four percent of the sales price of such

property, regardless of whether the retailer is or is not engaged in business in this State."

2. Section 12-35-160 provides:

"The term 'use' includes the exercise of any right or power over tangible personal property incident to the ownership of that property or by any transaction in which possession is given, except that it shall not include the sale of that property in the regular course of business."

3. Section 12-35-130 provides:

"The term 'storage' includes any keeping or retention of this State, for any purpose except sale in the regular course of business or subsequent use solely outside this State, of tangible personal property purchased at retail."

4. Section 12-35-820(2) provides:

"The storage, use or other consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this article:

* * *

(2) All tangible personal property specifically exempted from the tax imposed by the provisions of Article 5 of this Chapter."

5. Section 12-35-550(1) provides:

> "There are exempted from the provisions of this article, and from the computation of the amount of the tax levied, assessed or payable under this article, the following:
>
> (1) The gross proceeds of the sale of tangible personal property or the gross receipts of any business which the State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

STATEMENT OF THE CASE

The Statement of the Case presented in the Petition for Writ of Certiorari does not completely reflect all of the facts pertinent to this matter. After the purchase of the twenty trailers in Augusta, Georgia and the thirty trailers in Charlotte, North Carolina, the petitioner transported the trailers to its primary terminal at Newberry, South Carolina. The trailers arrived in Newberry empty.

Upon arrival in Newberry, the trailers were modified by the addition of decals,

numbers, signs and license plates, tarpaulins, padding, straps and storage compartments. (See Appendix A-4 of Petition for Writ of Certiorari.) After the modifications were completed, the trailers were available for transporting goods. However, before the trailers actually picked up their first load, a period of two to three weeks elapsed during which time the trailers were stored in South Carolina. (See Appendix A-4 of Petition for Writ of Certiorari.) The trailers were registered in Newberry County for property tax purposes and each trailer picked up its first load of freight in South Carolina. (See Appendix A-4 of Petition for Writ of Certiorari.)

ARGUMENT SUMMARY

The law is well settled that a use tax does not violate the Commerce Clause where the facts demonstrate the purchased property was carried into the taxing state and there

brought permanently to rest or merely halted temporarily before resuming its interstate course or usage. Southern Pacific Co., supra. Further, the decision of the South Carolina Supreme Court is in conformity with the decisions of the highest courts of other states which have addressed similar questions. Thus, review by this Court is unwarranted since such would involve only applying established evidence to familiar legal principles. Here, there is ample evidence demonstrating a storage of two to three weeks in South Carolina and the exercising of ownership over the trailers within South Carolina.

Further, there is no conflict between the decision of the South Carolina Supreme Court in this matter and the decision of this court in Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Complete Auto's test is not applicable since the use tax in question is upon

the privilege of use after commerce is at an end and such tax is not a tax which substantially affects interstate commerce. Beatrice Foods Co., Inc. v. Lindley, 434 N.E.2d 727 (Ohio 1982). Even assuming the four tests of Complete Auto, supra, do apply, all are satisfied since the activities of the petitioner in South Carolina are substantial, the tax is fairly apportioned since South Carolina's tax is a first use tax with the first use capable of only occurring in one state, the tax is nondiscriminatory and the tax is fairly related to the services provided by South Carolina.

Based upon the foregoing, the Petition for Writ of Certiorari should be denied.

ARGUMENT

The issue raised in this matter is the alleged violation of the Commerce Clause of the United States Constitution at Article 1,

Section 8 by the imposition of a use tax resulting from the purchase of trailers. The trailers were stored in South Carolina for two to three weeks and were first placed in service in South Carolina after being subjected to numerous modifications.

This Court should not grant the Petition sought since this matter has been resolved by this Court in prior opinions and by other State Courts on prior occasions. Further, the result in the South Carolina Supreme Court is a correct result and does not conflict with the four criteria of Complete Auto Transit, Inc. v. Brady, supra.

The imposition of a use tax has been upheld as not in violation of the Commerce Clause by this Court on numerous occasions where the facts show property was carried into the taxing state and there brought permanently to rest or merely halted temporarily before resuming its interstate course or

usage. Scripto v. Carson, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960); General Trading Co. v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309 (1944); Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888 (1941); McGoldrick v. Berwind-White Mining Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565 (1940); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488(1939); Pacific Telephone & Telegraph Co. v. Gallagher, 306 U.S. 182, 59 S.Ct. 396, 83 L.Ed. 595 (1939); Southern Pacific Co. v. Gallagher, supra, and Henneford v. Silas Mason Co., supra. The same result has been reached on many varied fact situations in state courts of last resort and the result reached by the South Carolina Supreme Court is consistent with such decisions. Hunnewell Trucking, Inc. v. Johnson, 172 A.2d 732 (N.C. 1961); Great Lakes Dredge & Dock

Company v. Norberg, 369 A.2d 1101 (R.I. 1977); Tri-City Broadcasting Co. v. Bowers, 158 N.E.2d 203 (Ohio 1959); Management Services, Inc. v. Spradling, 547 S.W.2d 466 (Mo. 1977); Skelton v. Pederal Express Corp., 531 S.W.2d 941 (Ark. 1976); Mavar Shrimp & Oyster Co. v. Stone, 73 So.2d 109 (Miss. 1954); Powell v. Maxwell, 186 S.E. 326 (N.C. 1936); Colonial Pipeline Company v. Clayton, 166 S.E.2d 671 (N.C. 1969); Serodino, Inc. v. Woods, 568 S.W.2d 610 (Tenn. 1978).

It is undisputed that the trailers at issue were stored for two to three weeks and underwent repairs and modifications in South Carolina prior to picking up their first load of freight. During such storage period and because of such repairs and modifications, the trailers acquired a "taxable moment" when such trailers were not in interstate commerce. Southern Pacific v. Gallagher,

supra. Thus, a review by this Court is unwarranted since such would involve only applying established evidence to familiar legal principles where the factual findings are supported by substantial evidence.

There is no conflict between this Court's decision in Complete Auto Transit, Inc., supra, and the decision reached by the South Carolina Supreme Court in the instant case. Complete Auto Transit requires that before a tax which substantially affects interstate commerce may be imposed, such tax must be related to local activities, fairly apportioned, nondiscriminatory and fairly related to the services provided by the state.

First, this is not a tax which substantially affects interstate commerce as was the case in Complete Auto Transit, supra. In that case, a five percent tax was levied upon gross income with the gross income

being derived from both interstate and intrastate activities. However, in the instant case, a use tax is imposed with such tax being not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end. Beatrice Foods Co., Inc. v. Lindley, supra, at 731. The use or exercising of ownership and storage occurred within South Carolina prior to the trailers ever entering interstate commerce.

Even assuming the tests of Complete Auto Transit, supra, do apply, all four prongs are satisfied. First, the petitioner has substantial activity connected with South Carolina to support a nexus to this State since it operates many terminals in the State, has its primary terminal in Newberry, South Carolina, and is incorporated under South Carolina law.

Second, the use tax is fairly apportioned. The fair apportionment is aimed at eliminating the risk of multiple taxation. The

record shows that the use tax here imposed was the only tax imposed on the purchase of the fifty trailers in that no other state imposed a sales or use tax. Further, no other state could impose a use tax like South Carolina's on the purchase of the trailers since the South Carolina use tax operates as a compensatory tax complementing the sales tax. South Carolina's use tax is a first use tax and the first use can only occur in one place. Thus, no apportionment is required where the first use as here occurred in South Carolina.

Third, there is no discrimination against interstate commerce since all buyers in South Carolina will pay either a four percent sales tax charged and collected by their seller if a purchase is made in the State, or a four percent use tax if the purchase is made outside the State but used, stored, or consumed in South Carolina.

Thus, buyers whether within or without the State are treated equally and no discrimination against interstate commerce results.

Fourth, the tax is in fair relation to services provided by South Carolina since the measure of the tax, the sales price, is reasonably related to the extent of the petitioner's contact within South Carolina. Commonwealth Edison v. State of Montana, 453 U.S. 609 (1981).

Since there is no conflict with Complete Auto Transit and since the decision of the South Carolina Supreme Court is in keeping with the numerous decisions of both this Court and other State Courts, there is no basis for granting the Petition for Writ of Certiorari.

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 1984, three copies of a Brief In Opposition To Petition For Writ of Certiorari were mailed by depositing same in the United States Post Office at Columbia, South Carolina, with first class postage prepaid, addressed to Frank A. Graham, Jr., as Counsel of Record for the Petitioner, at Post Office Box 11864, Columbia, South Carolina 29211.

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